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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

TAM DUC TRUONG,
Plaintiff and Appellant,

v.

SUONG MAI NGUYEN,
Defendant and Respondent.

A122622

(San Mateo County
Super. Ct. No. CIV 453991)

I.

Appellant Tam Duc Truong appeals following a bench trial which resulted in a judgment in favor of respondent Suong Mai Nguyen on his complaint, and which awarded respondent \$2,500 on her cross-complaint. Appellant contends the trial court abused its discretion in denying his motion for leave to file an amended complaint alleging an additional cause of action for fraud against respondent, presented on the day of trial. We affirm.

II.

Appellant filed his complaint alleging a single cause of action for breach of contract against respondent on July 28, 2006.¹ The complaint alleged that appellant entered into a contract with respondent on November 18, 2005, by which he purchased

¹ Both the breach of contract claim, and a second cause of action for interference with contract, were asserted against another defendant, Long Thanh Nguyen (Mr. Nguyen), who is respondent's father. However, Mr. Nguyen is not party to this appeal.

the interest of respondent and her father, Mr. Nguyen, in a restaurant. As a condition of that contract, respondent agreed to be involved, in a productive way, in the management and operation of the restaurant. However, she failed to do so, and also failed to intercede and stop the active interference by Mr. Nguyen in the restaurant business. Appellant alleged that this constituted a breach of contract resulting in the loss of profits and his investment.

Respondent denied the allegations of the complaint in her answer filed on December 10, 2007. On December 14, 2007, respondent filed a cross-complaint for money damages, alleging breach of contract and an open book account claim against appellant. The pleading asserted that appellant improperly kept proceeds from restaurant operations, and failed to pay rent or vendors. It was also alleged that appellant's defalcations resulted in damages to respondent of more than \$50,000.²

Trial was held on June 16, 2008. On that morning, appellant filed an ex parte motion to amend the complaint pursuant to Code of Civil Procedure section 473, subdivision (a)(1),³ seeking to add a cause of action for fraud against respondent. In his motion, appellant contended he had just learned of the facts underlying the fraud "recently" due to concealment by respondent. The accompanying proposed amendment alleged that respondent had promised appellant she would be an "active partner in the restaurant business, which she never intended to fulfill." It further alleged that

² While the record on appeal is incomplete, it appears that respondent defaulted by not answering the complaint, and appellant defaulted by not responding to the cross-complaint. A motion for relief was made by appellant (erroneously under Code Civ. Proc., § 437.5), and respondent filed a motion for relief from default under Code of Civil Procedure section 473, subdivision (b). Although no orders ruling on the motions are included in the appellate record, the record does include the December 10, 2007 answer to the complaint, and we infer from additional facts in the record that subsequently a case management conference was held, the matter proceeded to trial, and motions for relief ultimately were granted.

³ All subsequent undesignated statutory references are to the Code of Civil Procedure.

respondent withheld information that the business was in unlawful detainer proceedings as of the time the parties entered into the 2005 contract.

In his declaration submitted in support of the motion, appellant's counsel averred that an unlawful detainer action had been filed against respondent Mr. Nguyen, who together owned the restaurant, and that a judgment had been obtained against them several weeks prior to their sale of the business to appellant. Appellant's counsel was notified by counsel for the landlord about the landlord-tenant dispute, and the two corresponded several times about the matter during 2006. Through these contacts, counsel claims that he understood the sums allegedly due the landlord for past-due rent was for the period post-dating appellant's termination of the restaurant business, although he conceded that counsel's correspondence indicated that the landlord was not waiving his right to recover from appellant. While counsel claimed not to have discovered the true extent of the pending landlord-tenant dispute until he received respondent's settlement conference statement in May 2008, he conceded that the 2006 correspondence from landlord's counsel "should have alerted me to the existence of the earlier filing," and that he "did not peruse it as carefully as I would have otherwise, and did not notice the difference in time between the issuance of the writ and the judgment."

The documents accompanying counsel's declaration included a letter dated April 7, 2006, from the landlord's counsel confirming that "[w]hile my client will not become involved in this dispute between [appellant] and Mr. Nguyen, my client does not waive any right to seek enforcement of the lease terms against [appellant], as the approved assignee of the lease, as well as against Mr. Nguyen." This sentiment was similarly expressed in a letter from landlord's counsel to counsel for both appellant and respondent dated September 28, 2006, accompanied by a copy of a writ of possession issued on August 31, 2006.

The parties appeared for trial on June 16, 2008. In summarizing the case for the trial court, respondent's counsel noted that a motion for nonsuit had been filed. Counsel indicated that the case against appellant had proceeded to trial "last year," which had resulted in a defense verdict in favor of Mr. Nguyen and against appellant. Counsel for

appellant then indicated that a motion for leave to amend the complaint had been filed. The court stated its intention to review counsel's declaration and "if further arguments merit, I'll inform counsel."

In response, respondent's counsel objected to the motion to amend, indicating that counsel's declaration was not filed under penalty of perjury, the motion had been improperly noticed, and there was a lack of good cause to seek the amendment. After hearing further from both sides, the trial court concluded: "All right. The motion to amend is denied. It's late. The showing presented indicates that [appellant] has facts at least a month old. In addition the documents in themselves indicate that. You have an April 7th letter from the attorney for the landlord, a September 28th letter of 2006. Counsel has a duty of investigation. All of those factors militate against granting the motion and that's the reason it's denied."

After hearing the evidence, judgment ultimately was entered in favor of respondent as to the complaint, and an award of \$2,500 was entered in her favor on the cross-complaint against appellant. An appeal was filed by appellant challenging only the denial of his motion for leave to file an amended complaint to allege a cause of action for fraud.

III.

Subdivision (a)(1) of section 473 states: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code."

We review the trial court's ruling on an motion for leave to amend under section 473, subdivision (a)(1) for abuse of discretion, recognizing that the "trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a

matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]’ [Citation.]” (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) “The burden is upon plaintiff to show that the trial court abused its discretion in not granting leave to amend the complaint. [Citation.]” (*Legg v. Mutual Benefit Health & Accident Assn.* (1960) 184 Cal.App.2d 482, 489.)

“The law is well settled that a long deferred presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court’s denial of the amendment. [Citation.]” (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 135-136.) “The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.” (*Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939-940.)

There was no abuse of discretion in the denial of appellant’s motion in this case. Appellant’s counsel conceded in his supporting declaration to the motion for leave to amend⁴ that he learned during communications with counsel for the landlord more than two years earlier that there was a dispute concerning past-due rent, and that the landlord was not waiving any rights to recover those amounts against appellant. Indeed, the document themselves which were attached to the motion confirm this information as well.

At the hearing on the motion, appellant’s counsel tried to minimize the impact of this “evidence” by arguing he did not understand the full extent of the landlord-tenant dispute until he received respondent’s settlement conference statement. However, counsel admitted to the trial court that he had this document as early as May 14, 2008. In response to the court’s inquiry as to why nothing had been done concerning the amendment even within that time frame, counsel simply offered that his client was in Vietnam “during all that time.”

⁴ The procedural point raised by respondent’s counsel that the declaration was not signed under penalty of perjury was not relied on by the trial court as a ground to deny the motion. However, the point is well taken. (See § 98.)

In *Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 649, a five-month delay in seeking leave to amend after learning of facts presumably justifying the amendment was held to be sufficient reason to deny the motion. Here, the trial court found that appellant's counsel had been sufficiently aware of the facts underlying the alleged fraud for more than two years, yet no explanation was offered by counsel for the delay of this length. Even accepting counsel's unverified statement that he did not know the full extent of the property dispute until two weeks earlier, once again, there was no sufficient reason given for not making the motion earlier. We note too that respondent's counsel claimed prejudice by virtue of the delay, and the fact that "[w]e haven't done discovery on this issue. . . . If we knew this cause of action was forthcoming we would be prepared for it." Appellant's counsel did not dispute this claim of prejudice, nor did appellant offer to continue the trial to allow discovery to be conducted. (See *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 297; *North 7th Street Associates v. Constante* (2001) 92 Cal.App.4th Supp. 7.)

Therefore, there was no abuse of discretion in the trial court's decision to deny appellant's motion for leave to amend the complaint. In so concluding, we recognize that judicial discretion concerning whether to allow amendments to pleadings is tempered by a policy of liberality that favors such amendments (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596), and that motions to amend pleadings may be made at any time, including during trial (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761; *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1124). However, inexcusable delay in presenting it remain a valid reason for denial. (*Roemer v. Retail Credit Co.*, *supra*, 44 Cal.App.3d at pp. 939-940.)

IV.

The judgment and order denying appellant leave to file an amended complaint are affirmed. Costs on appeal are awarded to respondent.

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.